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No. 89-1244

IN THE

Supreme Court of the United States

October Term, 1989

STEVEN J. SHARP,

Petitioner,

vs.

STATE OF INDIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED

Whether the Confrontation Clause permits the admission into evidence of tape recorded conversations concerning illicit drug transactions between the accused and a deceased informant, without a prior showing of the reliability of the evidence.

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Respondent, State of Indiana, respectfully requests the Court to deny the issuance of a Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, refuse to review the decision entered by that court in cause number 34S00-8802-CR-211 on February 28, 1989.

OPINION BELOW

The opinion of the Indiana Supreme Court was rendered on February 28, 1989, and is officially reported at 534 N.E.2d 708. The opinion is set forth in Petitioner's Appendix A. A timely Petition for Rehearing was filed with the Indiana Supreme Court on March 8, 1989. The Petition for Rehearing was denied without opinion on November 29, 1989. A copy of this order is also contained in Petitioner's Appendix A, p. 26a.

STATEMENT OF THE CASE

The Kokomo, Indiana, police arranged for Anthony Tolleson to be a confidential informant and to cooperate in the purchase of illicit drugs from Petitioner. On November 7, 1985, Tolleson placed a telephone call to Petitioner from the Kokomo Police Department. The telephone call was tape recorded by the police. In that telephone call Tolleson made arrangements with Petitioner to purchase ten tablets of Demerol and ten tablets of Percodan from Petitioner.

Tolleson was then fitted with a radio transmitter and given $80. While the police kept Tolleson under surveillance and monitored and recorded the transmissions from the radio, Tolleson drove to Petitioner's home where he purchased the tablets from Petitioner. Laboratory tests confirmed the tablets were Demerol and Percodan.

On December 6, 1985, Tolleson made a second tape recorded telephone call to Petitioner from the Kokomo Police Department. In this telephone conversation Tolleson agreed to purchase thirty tablets of Fiorinal and Tylenol with Codeine from Petitioner. Again, Tolleson was fitted with a radio transmitter and the police provided surveillance and monitored and recorded the transmissions from the radio while Tolleson drove to Petitioner's home and purchased some tablets from Petitioner. Laboratory tests confirmed that the tablets were Fiorinal and Tylenol with Codeine.

On January 21, 1986, Tolleson made a third tape recorded telephone call to Petitioner from the Police Department. Tolleson arranged to purchase $50 worth of Demerol tablets from Petitioner. Tolleson, again, went to Petitioner's home equipped with a hidden radio transmitter while under police surveillance and monitoring.

When Tolleson exited Petitioner's home the police approached, entered the home, and arrested Petitioner. A consent to search was signed by Petitioner and the police found the buy money on Petitioner. Tolleson had possession of tablets that laboratory tests confirmed were Demerol.

Petitioner was charged and tried by a jury on six drug related counts. Prior to trial, Tolleson was murdered. At trial, the court allowed into evidence the tape recordings of the three telephone calls and the tape recordings of the three drug transactions. The jury found Petitioner guilty on all counts and he was sentenced to a total of thirty years.

Petitioner thereafter appealed to the Indiana Supreme Court, which affirmed his conviction. A Petition for Rehearing was subsequently denied by that court.

SUMMARY OF THE ARGUMENT

The out-of-court statements involved in this case were properly admitted for they constituted statements of co-conspirators. In addition the statements were admissible as admissions. In either event, indicia of reliability was not required before the statements were admissible. The circumstances presented by this case are effectively governed by previous opinions of the Court. It is therefore unnecessary to grant certiorari.

REASONS FOR DENIAL OF THE WRIT

Petitioner contends that certiorari should be granted because the out-of-court tape recorded statements were admitted without a prior showing of reliability. However, the Court has previously determined this issue adversely to Petitioner.

In a drug case involving co-conspirators, wherein tape recorded telephone conversations were admitted into evidence, the Court expressly ruled that an inquiry into independent indicia of reliability is not mandated by the Constitution. *Bourjaily v. United States*, 483 U.S.171, 107 S.Ct. 2775, 2782 (1987). The present case is remarkably similar to *Bourjaily*, where a police informant was also involved in arranging drug transactions over the telephone.

Respondent asserts that the circumstances in the case at bar are sufficient to establish a conspiracy between Petitioner and Tolleson. That Tolleson placed telephone calls to Petitioner and

then met with Petitioner at his home on three occasions, after which Tolleson would return with illicit drugs to the police, is sufficient to establish the existence of a conspiracy to deal in illicit drugs, independent of the conversations themselves. *See Siglar v. State*, Ind., 541 N.E.2d 944, 949 (1989). Because the tape recorded conversations involved statements of co-conspirators, they were clearly admissible, even without a showing of reliability. *See Bourjaily, supra*, 2782-2783.

An additional reason exists for denial of the writ. In its holding on this issue, the Indiana Supreme Court observed that the hearsay rule was not intended to protect a party from his own out-of-court statements, citing to *Jethroe v. State*, 262 Ind. 505, 319 N.E.2d 133 (1974). *Jethroe* was based upon the hearsay exception for admissions. This is, of course, a well recognized exception to the hearsay rule. *See McCormick on Evidence*, § 26 (1972). Because admissions are a firmly rooted exception to the hearsay rule, such are admissible without independent indicia of reliability. *See Bourjaily, supra*, 2782-2783; *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

In the case at bar, Petitioner's own conversations regarding the drug transactions were clearly admissions. No independent indicia of reliability was therefore required before these statements were admissible. *See Bourjaily, supra; Roberts, supra*. Moreover, the statements in the conversations to Petitioner by Tolleson regarding the drug transactions constituted adoptive or tacit admissions by Petitioner. *See United States v. Rollins*, 862 F.2d 1282, 1296-1297, reh. den., cert. den., *Slaughter v. U.S.*, 109 S.Ct. 2084, (7th Cir. 1988); *Wickliffe v. State, Ind.*, 424 N.E.2d 1007, 1009 (1981). These statements, therefore, were also admissible without independent indicia of reliability, since they were also based upon this firmly rooted hearsay exception.

It is Respondent's position, for the above reasons, that Petitioner has failed to present any significant constitutional issue in need of resolution. The question presented by Petitioner has effectively been decided by the Court's previous opinions in

Bourjaily, supra; and *Roberts, supra*. The decision of the Indiana Supreme Court in the present case does not conflict with the law espoused in *Bourjaily* and *Roberts*.

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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